NO. 18-489

IN THE

Supreme Court of the United States

RADLEY WESTON TAGGART,

Petitioner,

v.

SHELLEY A. LORENZEN, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Consumer Bankruptcy Rights Center (NCBRC) is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors certain rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system are often ill-equipped to protect their rights in the appellate process. NCBRC files amicus curiae briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

The National Association of Consumer Bankruptcy Attorneys (NACBA) is a nonprofit organization of over 2000 consumer bankruptcy attorneys nationwide. NACBA has members practicing in all 50 states as well as Puerto Rico and the District of Colombia. As such NACBA and its members have a special interest in the uniformity of bankruptcy practice across the United States.

NCBRC, NACBA and its membership have a vital interest in the outcome of this case. Most debtors find it hard to afford bankruptcy, let alone

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than NCBRC, NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief. Both Petitioner and Respondent have consented to the filing of this brief, and letters of consent accompany the brief.

defend against collection of discharged debts. Notwithstanding the discharge injunction, creditors frequently attempt to collect on their discharged debt, and they have advanced creative theories to justify those collection attempts.

However, debtors and creditors alike need to understand the extensive scope of the discharge. That is best accomplished with a straightforward and easily understandable test that draws a bright line focused on creditor conduct. If the creditor has notice of the bankruptcy and intended its actions, then attempts to collect on a pre-petition, discharged debt violate the discharge injunction. However, the test adopted by the Ninth Circuit directly conflicts with two other Courts of Appeal and focuses not on creditor conduct, but on the subjective beliefs of the creditor when it admittedly tried to collect on a discharged debt. The result is that in the Ninth Circuit, but not in other circuits, the simple discharge injunction is now expensive and complicated to enforce given the exception created in *Lorenzen v. Taggart* (*In re Taggart*), 888 F.3d 438 (9th Cir. 2018).

SUMMARY OF ARGUMENT

NCBRC and NACBA agree with the Debtor-Petitioner that certiorari should be granted to resolve a conflict in the circuits. Multiple circuits and lower courts have followed a decades old rule that a creditor who has knowledge of a bankruptcy and attempts to collect a discharged debt, violates the discharge injunction. There is no good faith exception. *Internal Revenue Serv. v. Murphy (In re Murphy)*, 892 F.3d 29 (1st Cir. 2018) (interpreting discharge injunction as applied to the IRS); *Hardy v.*

United States (*In re Hardy*), 97 F.3d 1384, 1390 (11th Cir. 1996). *See also Banco Popular, North America v. Kanning*, 638 Fed. Appx. 328, 342 (5th Cir. 2016) (describing test for evaluating discharge violation and citing *Hardy*); *Bradley v. Fina (In re Fina)*, 550 Fed. Appx. 150, 145-55 (4th Cir. 2014) (citing *Hardy* and concluding subjective belief or intent not relevant to inquiry). In *Taggart* the Ninth Circuit departed from the above test and held that a creditor's "good faith" is sufficient to excuse a discharge violation, "even if the creditor's belief is unreasonable." This conflict, if allowed to continue, imposes great costs upon a bankruptcy system as well as undermining the efficacy of the bankruptcy discharge. *Taggart* requires an evidentiary hearing in every discharge violation case where the creditor claims it acted in "good faith" albeit subjectively and unreasonably, in trying to collect on a discharged debt. No such requirement exists in other circuits and for decades that requirement did not exist in the Ninth Circuit. The *Taggart* test further increases costs by encouraging creditors to "take a chance" on collecting discharged debt knowing they can evade sanctions for their behavior by claiming "good faith." Finally, *Taggart* shifts the costs of discharge violations from the culpable creditor to the debtor. It places the debtor in the unenviable position of having to defend his or her discharge, knowing that a creditor's simple declaration of good faith will not only force an evidentiary hearing, but one that sets a very high bar for the debtor to prevail, even where the discharge violation is obvious.

The Court should grant the Petition for Writ of Certiorari, resolve the conflict in the circuits, and adopt the *Hardy* test for violation of the discharge

injunction. That test is straightforward, easy to apply, and contains no good faith exception. It preserves and protects the discharge injunction that is at the foundation of bankruptcy law.

ARGUMENT

I. *TAGGART* CREATES A BROAD EXCEPTION TO THE DISCHARGE INJUNCTION THAT RENDERS IT VIRTUALLY MEANINGLESS.

Lorenzen v. Taggart (*In re Taggart*), 888 F.3d 438 (9th Cir. 2018), holds that a creditor does not violate the discharge injunction if the creditor had a good faith belief, even if unreasonable, that the discharge injunction did not apply to its act or action to collect on a discharged debt against the debtor.

To prove a discharge violation under *Taggart*, the debtor must show by clear and convincing evidence that the "... alleged contemnor was aware of the discharge injunction and aware that it applied to his or her claim. Whether a party is aware that the discharge injunction is applicable to his or her claim is a fact-based inquiry which implicates a party's subjective belief, even an unreasonable one." *In re Taggart*, 548 B.R. 275, 288 (B.A.P. 9th Cir. 2016); *In re Farley*, 2016 WL 7471291, *3 (Bankr. N.D. Cal. Dec. 27, 2016).

Taggart has created a discharge injunction test that turns on subjective motivation and not the objective acts of the creditor. The Ninth Circuit then places the burden of proof on the debtor to show by clear and convincing evidence that the creditor (1) knew the discharge injunction was applicable and (2) intended the action which violated the injunction. The debtor must prove that the creditor actually

knew the injunction applied to the creditor's claim. Furthermore, a creditor's subjective good faith belief, even if unreasonable, that the discharge injunction did not apply to its claim, is a complete defense to a discharge injunction violation. *Lorenzen v. Taggart*, 888 F.3d at 444.

Under *Taggart* a creditor can ignore the discharge injunction, start collection activity on a discharged debt, and then when challenged, demand an evidentiary hearing forcing a debtor to disprove the creditor's "subjective intent." Given that a creditor can assert its subjective intent as a complete defense, articulation by the creditor of any plausible scheme or argument allows a creditor to ignore the discharge injunction without risk of sanctions.

II. IN ADDITION TO MYRIAD SCHEMES USED BY CREDITORS TO COLLECT DISCHARGED DEBT, IN THE NINTH CIRCUIT CREDITORS MAY NOW ALSO CLAIM A SUBJECTIVE GOOD FAITH BELIEF, EVEN AN UNREASONABLE ONE, THAT THE INJUNCTION DID NOT APPLY TO ITS CLAIM.

As noted in *In re Lang*, 398 B.R. 1, 4 (Bankr. N.D. Iowa 2008), creditors have a myriad of theories, which are, at best, "superficially rationalized schemes intended and actually work to extort payment of a discharged debt."

Taggart provides a roadmap to how to successfully extort payment of a discharged debt. All that a creditor must do is submit an affidavit or testify that the creditor believed that the injunction did not apply to its debt. The creditor is not required to justify the belief. "Subjective self-serving testimony" is sufficient to establish "good faith"

unless undisputed facts showed otherwise. *Taggart I, supra*, 548 B.R. at 288.

Such self-serving testimony precludes contempt sanctions:

> "... whenever the alleged contemnor testifies that, for whatever reason, he or she did not subjectively believe that the discharge applied to his or her claim, no matter how misguided or unreasonable that belief might have been."

In re Chionis, 2013 WL 6840485, *8 (B.A.P. 9th Cir. Dec. 27, 2013). And as noted below, Ninth Circuit courts have embraced the literal application of a subjective, good faith test which "seemingly would render the bankruptcy discharge all but toothless." *Chionis*, 2013 WL 6840485 at *8.

Taggart involves such a "superficially rationalized scheme" known as "returning to the fray." The creditors forced Taggart to defend himself in post-petition proceedings concerning a pre-petition contract and then claimed he "returned to the fray" and in so doing, waived the discharge as to the creditors' claim for attorney fees under the pre-petition agreement. While the creditors were able to persuade the trial court and the bankruptcy court that Taggart had "returned to the fray," both the Oregon Court of Appeals in *Sherwood Park Bus. Ctr., LLC v. Taggart*, 267 Or. App. 217, 230 (Or. Ct. App. 2014) and the District Court in this case found that Taggart's actions were insufficient to constitute a "return to the fray."

Yet once that theory of liability failed, the Ninth Circuit agreed that the creditors' subjective,

good faith belief that the discharge injunction did not apply to their claim, excused the creditor's violation of the discharge injunction. It ruled so even though the creditors failed to get a final determination through appeal of the validity of the "returning to the fray" theory before trying to collect on the discharged debt.

III. AFTER *TAGGART*, COURTS IN THE NINTH CIRCUIT HAVE CONSISTENTLY REVERSED BANKRUPTCY COURT DISCHARGE INJUNCTION CONTEMPT FINDINGS, WHERE THE CREDITOR INVOKED ITS SUBJECTIVE GOOD FAITH BELIEF THAT THE DISCHARGE DID NOT APPLY TO ITS CLAIM.

Taggart ruled as a matter of law that Taggart's creditors held a subjective belief the discharge did not apply to their claim. That subjective belief excused the creditor from its violation of the discharge injunction. Relying on the Bankruptcy Appellate Panel (BAP) decision in *Taggart I*, the Court found that the creditor's good faith belief was not in question. As a result, Taggart was forced to bear the costs of defending his bankruptcy discharge, which exceeded $105,000.00 in reasonable attorney fees.[2]

In subsequent cases Ninth Circuit courts have consistently reversed bankruptcy courts who imposed sanctions for a discharge violation, if a

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[2] Taggart's attorney fees and costs totaled $105,000.00 through the bankruptcy court evidentiary hearing. By that time Taggart had been forced to litigate in state and federal court, at the trial and appellate level. It does not include the attorney fees and costs in *Taggart I* and the instant case.

creditor raised its subjective intent to preclude liability. Four examples stand out.

The first example is *Parker v. Nelson (In re Nelson)*, 2016 WL 7321196 (B.A.P. 9th Cir. Dec. 15, 2016). Citing to *Taggart I* and *Zilog, Inc. v. Corning, et al. (In re Zilog, Inc.)*, 450 F.3d 996 (9th Cir. 2006), the BAP reversed the bankruptcy court's order holding the debtor's former attorney (Parker) in contempt for violating the discharge injunction. In *Nelson,* Parker represented the debtor with respect to pre-petition accident claims. He was terminated from representing the debtor, and he was listed as a creditor on the bankruptcy petition and mailing matrix at the correct address.

After the petition was filed, but before the discharge Parker asserted an attorney's lien of $5,000 against the proceeds of any settlement. Parker continued to assert the amount was owed after the debtor received her discharge. On two occasions the debtor's current attorney sent letters to Parker putting him on notice that the asserted attorney lien violated the discharge injunction. Parker never responded to the two letters and debtor's attorney filed a motion for contempt for violation of the discharge injunction and to declare that the attorney's liens were void. Parker did not timely appear at the hearing and the motion was granted. The debtor was awarded attorney fees and costs in the amount of $2,049.00 for having to file the motion for contempt. No evidentiary hearing was held.

On appeal the BAP reversed the bankruptcy court order and remanded the case for an evidentiary hearing under the two-part test from *Zilog,* which was followed in *Taggart.*

A second hearing was held and once again Parker was found in contempt. The bankruptcy court found that Parker had actual knowledge of the discharge injunction in 2013 and still continued to assert his lien in violation of the discharge injunction for two years thereafter. The bankruptcy court awarded the debtor costs and attorney fees in the amount of $17,887.50.

On appeal for a second time, the BAP once again reversed the bankruptcy court. On review the BAP found it was sufficient for Parker to assert the defense that he did not know that the discharge injunction applied to his claims. As the dissent remarked "Parker avoids a finding of contempt simply by testifying (credibly) that he did not subjectively believe that the discharge applied to his attorney fee claims, no matter how misguided or unreasonable his belief might have been." *Nelson,* 2016 WL 7321196 at *11.

The second case is *In re Shaw,* 2017 WL 2791663 (B.A.P. 9th Cir. June 27, 2017). *Shaw* also reversed the bankruptcy court for failure of the debtor to prove by clear and convincing evidence that the creditor knew the legal theories the creditor asserted in post-discharge collection activity violated the discharge injunction.

In *Shaw* the creditor, Rogerson, sued the debtor Shaw in state court seeking to recover over $350,000 for Shaw's failure to make payments on a promissory note. *Id.* at *1. Shortly after the suit Shaw filed Chapter 7 bankruptcy, which stayed the state court action. Rogerson was listed both as a secured and unsecured creditor. Rogerson did not object to the discharge of her claims. Shaw received

his bankruptcy discharge in December 2014. Rogerson admitted receiving notice of the discharge.

Later in 2015, Rogerson amended her state court claim. *Id.* at *2. Her claims focused on an LLC, which Shaw formed after the promissory note had been executed and which was dissolved after Shaw's bankruptcy. Rogerson alleged that the LLC was liable for the promissory note debt and that Shaw remained personally liable on the discharged debt as the successor in interest to the LLC. That is, Rogerson sought to hold Shaw personally liable for the discharged debt in state court under a different theory of liability.

Shaw filed a motion in bankruptcy court to enforce his discharge. *Id.* at 3. The bankruptcy court rejected Rogerson's defenses and found that she had willfully violated the discharge injunction. She was aware of the discharge order. She had sued him on exactly the same debt that had been discharged. According to the bankruptcy court, the state court claims were merely an artifice to reimpose individual liability on Shaw for discharged debts. The court awarded Shaw attorney fees and costs in excess of $33,000.00.

The BAP reversed, finding that even though the bankruptcy court expressly cited the *Zilog/Taggart* test in making its determination, the court did not conduct an evidentiary hearing. *Id.* at *6. Furthermore, on the record before the court, Shaw had not proven that Rogerson subjectively knew that the legal theories of recovery she asserted violated the discharge injunction. The BAP remanded the case to the bankruptcy court to

conduct a hearing in accordance with *Zilog*. *Id.* at *6.

The third case is *Morning Star Company v. Benech (In re Benech)*, 17-CV-05100-LHK (N.D. Cal., Order Vacating Order of Bankruptcy Court, July 25, 2018) (Appendix 1a). In *Benech* the district court reversed a bankruptcy court contempt finding based on creditor's counsel "mistake of law." In 2009 Benech, the debtor, signed a promissory note secured by a deed of trust on his San Francisco property. In October 2013, Benech filed Chapter 7 bankruptcy and received his discharge in March 2014, which eliminated his personal liability on the note.

In 2015, in exchange for a 60-day delay in the foreclosure of his San Francisco property, Benech executed an agreement that purportedly reaffirmed his obligation to pay the creditor the full amount of his already discharged promissory note plus interest. After the property was sold, the creditor sued the debtor in state court on the balance of the promissory note after credit of the sale proceeds.

Benech's attorney informed the creditor that the underlying debt had been discharged in bankruptcy and not reaffirmed in the manner required by the Bankruptcy Code. When the creditor continued to pursue the debtor, Benech filed a Motion for Contempt in the bankruptcy court. At the hearing, counsel for the creditor revealed that he did not understand the basis for violating the discharge injunction. The court explained to him that the act of trying to collect on the discharged debt violated the discharge. The bankruptcy court noted that there was nothing in the pleadings to suggest the creditors did not understand it was a discharged debt. He

then found the creditor in contempt and awarded Benech $19,247.74 in attorney fees and costs.

On appeal the creditor asserted that Benech did not prove by clear and convincing evidence that the creditor knew the discharge applied to its claim, because creditor's counsel believed there was no violation for entering into an improper post-petition reaffirmation agreement and then enforcing it. The district court agreed and remanded the case to the bankruptcy court for an evidentiary hearing to determine if the creditor knew the discharge applied to its claim, keeping in mind that a good faith belief, even if unreasonable, would insulate the creditor from the discharge violation.

The fourth case is *Bruce v. Fazilat, (In re Bruce)*, 2018 WL 424581 (Bankr. N.D. Cal. July 12, 2018). In *Bruce* the bankruptcy court refused to issue sanctions despite finding a discharge injunction violation because of the creditor counsel's mistake of law. *Id.* at *5.

In *Bruce* the creditor sought to evict the debtor from rental housing by bringing an unlawful detainer action. *Id.* at *1-2. Before the case came to trial the debtor filed a Chapter 7 bankruptcy petition. The creditor was listed on the schedules. While the bankruptcy was pending, the creditor cut the lock off of the electrical box, turned the power off and put a new lock on the box. Shortly thereafter, the creditor tried to break into the house to collect the money owed. Then the creditor's daughter contacted the debtor's employer while the stay was still in effect, purportedly to ask for the debtor's address so he could be sued. Within a week of the

contact the debtor was told to resign his employment or be fired. He resigned.

After the discharge, the unlawful detainer trial was held and the creditor obtained a personal judgment for over $13,000.00 against the debtor for post-petition rent and costs in violation of the discharge injunction. *Id.* at *3. At a discharge injunction hearing the bankruptcy court found that the state court judgment imposed personal liability on the debtor on a lease that had been rejected in the bankruptcy. Therefore, the creditor's claim was treated as a pre-petition claim under 11 U.S.C. 502(g) and discharged. The state court judgment was declared to be void.

The bankruptcy court ordered sanctions for violation of the stay due to the extra-judicial attempts to force the debtor out of his house and interference with his job. However, the court declined to award sanctions against the creditor for obtaining a personal judgment against the debtor on a discharged debt. Citing to *Taggart's* unreasonable good faith belief standard, the court accepted the creditor attorney's defense that he believed he had a right to sue for holdover damages and attorney fees, despite the bankruptcy discharge. "Here, there is no doubt that [creditor's attorney] had a good faith belief that he was properly bringing an action in the state court for holdover damages and attorney's fees." *Id.* at *5. The court vacated the state court judgment but found no contempt.

IV. IN EACH OF THESE CASES THE EVIDENCE PRESENTED WOULD SUSTAIN A DISCHARGE VIOLATION AND CONTEMPT IN THE ELEVENTH CIRCUIT UNDER *HARDY*. UNDER *TAGGART* HOWEVER, THE DEBTOR IS SADDLED WITH AN IMPOSSIBLE TASK, PROVING BY CLEAR AND CONVINCING EVIDENCE THAT A CREDITOR DID NOT SUBJECTIVELY BELIEVE ITS DEBT WAS SUBJECT TO THE DISCHARGE INJUNCTION.

In each of the cases cited above, including *Taggart,* the debtor proved that the debtor filed bankruptcy, the creditor's debt was listed, the creditor received notice of the bankruptcy, the debtor received a discharge, the creditor received notice of the discharge, the creditor did not object to the discharge and that the creditor then continued to personally collect against the debtor or debtor's property on a debt it knew was discharged. In each of the cases the debtor's counsel informed the creditor or its counsel that the creditor's actions were violating the discharge injunction. In each case the creditor continued its collection action.

Under *Hardy* that proof is sufficient for the court to find a violation of the discharge injunction. There is no good faith exception. 97 F.3d at 1390. Yet in the Ninth Circuit that evidence is not sufficient to find a discharge injunction violation, albeit on the very same facts. In the Ninth Circuit the debtor also has the burden of proof of showing by clear and convincing evidence that a creditor did not subjectively believe its debt was subject to the discharge injunction. The court does not explain how a debtor disproves subjective intent. The fact that a debtor notifies the creditor in writing why its debt is discharged is not sufficient. And no amount of

objective proof suffices if the creditor is not persuaded to admit liability. Apparently only a Perry Mason moment on cross-examination would suffice, where under intense questioning the creditor breaks down, admits it was all a sham and that he just wanted his money. This is an impossible task to impose on a debtor as the price for protecting his discharge.

V. THESE FOUR NINTH CIRCUIT CASES ILLUSTRATE THAT THE *TAGGART* TEST REWARDS IGNORANCE OF BANKRUPTCY LAW.

In three of the four cases appellate courts reversed bankruptcy court decisions finding a violation of the discharge injunction, after the creditor articulated that it did not believe the bankruptcy discharge applied to its claim. In the fourth case the bankruptcy court declined to award damages because the creditor's attorney convinced the court that he believed he was acting properly in bringing the collection action for a discharged debt in state court. In each of those cases the creditor's action was based on a mistaken understanding of bankruptcy law and the discharge injunction, at a fairly elementary level.

A discharge in any case under title 11 pursuant to 11 U.S.C. 524(a)(1) voids any judgment at any time obtained, to the extent that the judgment is a determination of the personal liability of the debtor. It applies to any debt discharged under section 727 whether or not the discharge of such debt is waived. A discharge under Title 11 also operates as an injunction against the commencement or continuation of an action or an act to collect or recover any such debt as a personal liability of the

debtor, whether or not the discharge is waived. 11 U.S.C. 524(a)(2).

In *Nelson*, the creditor, an attorney, claimed he did not know that his claim for pre-petition legal services was discharged in bankruptcy. *Nelson,* 2016 WL 7321196 (B.A.P. 9th Cir. Dec. 15, 2016). In *Shaw,* the creditor knew the debt was discharged. 2017 WL 2791663 (B.A.P. 9th Cir. June 27, 2017). However, the creditor claimed that pursuing the debtor under a different theory of liability would justify attempt to collect the discharged debt. The bankruptcy court found that the state court claims were merely an artifice to reimpose individual liability on Shaw for discharged debts in violation of 524(a)(2).

In *Benech,* the creditor got the debtor to execute a purported reaffirmation agreement even though the agreement met none of the requirements under 11 U.S.C 524(c) and therefore was not enforceable. *Benech*, 17-CV-05100-LHK (N.D. Cal., Order Vacating Order of Bankruptcy Court, July 25, 2018). Regardless the creditor tried to enforce the agreement by suing in state court and in doing so violated the discharge injunction.

In *Bruce*, the creditor sought to impose personal liability on the debtor on a lease that had been rejected in the bankruptcy by seeking a post-petition personal judgment against the debtor. 2018 WL 424581 (Bankr. N.D. Cal. July 12, 2018). However, the post-petition judgment that the creditor obtained based on the pre-petition lease was void under 11 U.S.C. 727(b) and a violation of sections 524(a)(1) and (a)(2). Still the debtor had to

bear the cost of resorting to the bankruptcy court to avoid the $16,216.56 judgment obtained against him.

In each of these cases the debtor had to expend large sums of money to defend the bankruptcy discharge. In *Nelson* the debtor expended over $17,000.00 in attorney fees and costs, litigated two successful motions for contempt only to have the cases reversed based on the creditor's subjective belief that his underlying claim for attorney fees was not discharged in the bankruptcy. 2016 WL 7321196, at *4. In *Shaw* the debtor expended over $33,000.00 in attorney fees to defend his discharge. 2017 WL 2791663, at *1. In *Bruce* the debtor had to expend an unknown amount of fees to obtain a bankruptcy court ruling that a $17,000.00 post-petition judgment was void, in violation of the discharge injunction. In *Benech* the debtor expended over $19,000.00 in attorney fees and costs to defend against a state court suit brought on a discharged debt. *Benech*, 17-CV-05100-LHK (N.D. Cal., Order Vacating Order of Bankruptcy Court, July 25, 2018).

None of these are particularly complicated cases. Even if an attorney was not familiar with bankruptcy law, there are many attorneys who could provide advice and counsel. In each of the cases debtor's counsel explained the basis for the discharge violation. In each of the cases the creditor ignored those warnings. And if the creditor ignored that advice, then the creditor should bear the costs incurred by the debtor instead of being rewarded.

VI. THE EXACT SAME CONDUCT WHICH RESULTS IN SANCTIONS FOR A VIOLATION OF THE DISCHARGE INJUNCTION UNDER *HARDY AND MURPHY* IS EXCUSED UNDER *TAGGART*. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AND ESTABLISH A NATIONAL STANDARD FOR VIOLATION OF THE DISCHARGE INJUNCTION.

Under *Hardy* and *Murphy* a creditor violates the discharge injunction if the creditor (1) had notice of the discharge injunction, and (2) intended the actions that violated the injunction. There is no good faith exception. *In re Hardy,* 97 F.3d at 1390; *Murphy, supra,* 2018 WL 2730764. *See also Banco Popular, North America v. Kanning,* 638 Fed. Appx. 328, 342 (5th Cir. 2016) (describing test for evaluating discharge violation and citing *Hardy*); *Bradley v. Fina (In re Fina),* 550 Fed. Appx. 150, 145-55 (4th Cir. 2014) (citing *Hardy* and concluding subjective belief or intent not relevant to inquiry). Under *Taggart* a subjective, even unreasonable, belief that the discharge does not apply to the creditor's claims excuses the same collection action which justifies sanctions in other circuits.

Bankruptcy is a national law. The geography of the debtor should not determine when a discharge violation occurs. And there is no dispute in the cases that the creditors are violating the discharge injunction. However, there is a dispute as to the consequence of such a violation.

Under *Taggart* that conduct is excused if the creditor can articulate a belief that the discharge injunction did not apply to its claim. *Taggart* establishes an almost impossible burden, requiring the debtor to show by clear and convincing evidence

at an evidentiary hearing that the creditor did not believe the discharge applied to its claims.

Under *Hardy* the discharge injunction is violated when a creditor seeks repayment of a discharged debt after the creditor knows that the debtor had filed bankruptcy, listed the debt and received a discharge. Those facts are easy to ascertain and capable of objective proof. Good faith is not a defense. Creditors proceed at their own risk if they try to collect on a discharged debt without having obtained a final determination that the debt was excepted from the scope of the discharge.

Simply put, *Hardy* requires creditors to take responsibility for their own acts in trying to collect on a discharged debt; *Taggart* excuses creditors from that same responsibility.

CONCLUSION

Amici NCBRC and NACBA respectfully submit that Petitioner's Petition for a Writ of Certiorari be granted and the conflict between the circuits resolved.

Respectfully submitted,

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Dated: November 15, 2018

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE MORNING STAR COMPANY, et al.

Appellants,

v.

ROBERT BENECH,

Appellee.

Case No. 17-CV-05100-LHK

ORDER VACATING ORDER OF BANKRUPTCY COURT

THE MORNING STAR COMPANY, et al.

Appellants,

v.

ROBERT BENECH,

Appellee.

Case No. 17-CV-07108-LHK

ORDER VACATING ORDER OF BANKRUPTCY COURT

Appellants Morning Star Company, Weintraub Tobin Chediak Coleman Grodin Law Corporation, and Chris Rufer ("Appellants") appeal the Bankruptcy Court's order finding Appellants in contempt for violating the discharge injunction of Robert Benech ("Appellee"). *Morning Star Company et al. v. Benech*, Case No. 17-CV-05100-LHK ("*Morning Star I*"). Appellants also appeal the Bankruptcy Court's subsequent order awarding Appellee $19,247.74 in attorney's fees and costs

spent as a result of Appellee's violation of the discharge injunction. *Morning Star Company et al. v. Benech*, Case No. 17-cv-07108-LHK ("*Morning Star II*").[1] Having considered the parties' submissions, the relevant law, and the record in this case, the Court VACATES both orders and REMANDS for reconsideration of the contempt finding.

I. BACKGROUND

A. Factual Background

On October 8, 2009, Appellee executed a promissory note secured by a Deed of Trust in favor of Appellant Chris Rufer ("Rufer") in the amount of $310,000 ("the Promissory Note"). *Morning Star I*, ECF No. 10 (Appellant's Amended Excerpts of Record, or "ER") at 154. To secure Appellee's obligations under the Promissory Note, a Deed of Trust was recorded against Appellee's property in San Francisco, California. *Id.* On December 31, 2010, Rufer assigned his rights and obligations under the Promissory Note and Deed of Trust to Appellant Morning Star Company ("Morning Star"). *Id.* at 155.

On April 17, 2012, Appellee entered into a Severance and Release Agreement ("Severance Agreement") with VSP Products, Inc. ("VSP") which is owned by Rufer. *Id.* at 155. Prior to the Severance Agreement, Appellee was an employee of VSP. *Id.* The Severance Agreement amended the principal owed by Appellee under the Promissory Note to $250,000. *Id.*

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[1] The Court granted the parties' stipulation to consolidate the two appeals. *Morning Star I*, ECF No. 17; *Morning Star II*, ECF No. 5.

On December 20, 2013, Appellee filed for Chapter 7 bankruptcy, listing a $250,000 secured debt to Rufer. *Id.* at 129. On March 28, 2014, Appellee received his discharge. *Id.* at 170. Appellants do not dispute that this discharged the $250,000 Appellee owed under the Promissory Note. The bankruptcy case closed on August 15, 2014. *Id.* at 114.

On April 1, 2016, Appellee and Morning Star entered into a Promissory Note Payoff and Standstill Agreement ("Standstill Agreement"). *Id.* at 135–39 (text of the Standstill Agreement).

The Standstill Agreement obligated Appellee to pay Morning Star the entire balance of the already-discharged Promissory Note plus interest, which amounted to $345,334.59 plus an additional $51.37 of interest each day. *Id.* at 135–36. For its part, Morning Star agreed to delay its foreclosure of Appellee's San Francisco property until June 1, 2016. *Id.* at 136. The Standstill Agreement makes no mention of the bankruptcy proceedings. Appellee and Morning Star were both represented by counsel, but Appellee has since sued his former attorneys for malpractice. *Id.* at 92–95 (complaint in malpractice suit).

Appellee's sale of his San Francisco property resulted in a payment of $126,965.94 to Morning Star. *Id.* at 156. On February 15, 2017, Morning Star filed a complaint against Appellee in Superior Court for the County of Yolo that sought to enforce payment of the Promissory Note that had been discharged in bankruptcy. *Id.* at 153–58 (copy of complaint). On March 20, 2017, Appellee informed Morning Star through his current counsel that the

Promissory Note had been discharged in bankruptcy and asked Morning Star to dismiss the state court action. *Id.* at 145. Morning Star refused. *Id.* at 146–49. Instead, Morning Star filed an amended complaint that alleged Appellee had breached the Standstill Agreement instead of the Promissory Note and alleged that the Standstill Agreement was supported by separate consideration. *Id.* at 172–79.

B. Procedural History

On May 2, 2017, Appellee filed a motion to reopen his bankruptcy case in order to file a motion for damages against Morning Star for violating the discharge injunction. *Id.* at 103–04. On May 20, 2017, the Bankruptcy Court denied this motion on the grounds that the motion was unnecessary in order to bring a contempt motion. *Id.* at 104.

On June 29, 2017, Appellee filed a motion for contempt. *Id.* at 113–122 (copy of motion). On August 17, 2017, the Bankruptcy Court granted Appellee's motion and found Appellants in contempt. *Id.* at 1–3. The Bankruptcy Court, subject to further proof, awarded Appellee attorney's fees and costs incurred as a result of Appellants' violation of the discharge injunction and emotional distress damages. *Id.* at 2. The Bankruptcy Court denied an award of punitive damages. *Id.* On September 1, 2017, Appellants appealed the Bankruptcy Court's order finding Appellants in contempt. *Morning Star I*, ECF No. 1 (notice of appeal).

On December 5, 2017, the Bankruptcy Court awarded Appellee $19,247.74 in attorney's fees and costs. *Morning Star II*, ECF No. 1-2. On December 14, 2017, Appellants appealed the Bankruptcy Court's order awarding attorney's fees and costs.

Morning Star II, ECF No 1 (notice of appeal). On March 28, 2018, the Court granted the parties' stipulation to consolidate the two appeals. *Morning Star I*, ECF No. 17; *Morning Star II*, ECF No. 5.

On November 29, 2017, Appellants filed their opening brief. *Morning Star I*, ECF No. 8 ("Appellant Br."). On January 3, 2018, Appellee filed his response brief. *Morning Star I*, ECF No. 14 ("Appellee Br."). On January 17, 2018, Appellants filed their reply. *Morning Star I*, ECF No. 16 ("Reply Br.").

II. LEGAL STANDARD

A federal district court has jurisdiction to entertain an appeal from a bankruptcy court under 28 U.S.C. § 158(a), which provides: "The district courts of the United States shall have jurisdiction to hear appeals ... from final judgments, orders, and decrees[ ] of bankruptcy judges[.]" On appeal, a district court reviews a bankruptcy court's conclusions of law de novo, and the bankruptcy court's factual findings for clear error. *In re Greene*, 583 F.3d 614, 618 (9th Cir. 2009) (citing *In re Raintree Healthcare Corp.*, 431 F.3d 685, 687 (9th Cir. 2005)); *In re Salazar*, 430 F.3d 992, 994 (9th Cir. 2005); *see In re Taggart*, 548 B.R. 275, 286 (B.A.P. 9th Cir. 2016), *aff'd*, 888 F.3d 438 (9th Cir. 2018) ("*Taggart I*"). A bankruptcy court's "decision to impose contempt sanctions is reviewed for an abuse of discretion." *In re Taggart*, 888 F.3d 438, 443 (9th Cir. 2018) ("*Taggart II*").

III. DISCUSSION

The Bankruptcy Court found Appellants in contempt and awarded Appellee attorney's fees and

costs because the Bankruptcy Court found that Appellants had willfully violated the discharge injunction. Appellants argue that the Bankruptcy Court erred in finding them in contempt because they did not, in fact, violate the discharge injunction. Appellants argue in the alternative that even if they violated the discharge injunction the Bankruptcy Court misapplied the legal standard for a finding of contempt and should have conducted an evidentiary hearing. The Court rejects Appellants' initial argument, but agrees that the Bankruptcy Court misapplied the legal standard and should have conducted an evidentiary hearing.

A. Violation of the Discharge Agreement

Appellants' post-discharge contract with Appellee ("Standstill Agreement") revived debts Appellee had already discharged in bankruptcy. Appellants argue the Standstill Agreement could permissibly do this for three reasons. First, Appellants argue that the Standstill Agreement was valid because it was based on consideration separate from the debts Appellee discharged in bankruptcy. Second, Appellants argue that Appellee judicially admitted the Standstill Agreement is valid and therefore can no longer contend that the Standstill Agreement is not valid. Third, Appellants argue that Appellee forfeited any reliance on the discharge injunction because he voluntarily sought out and entered into the Standstill Agreement. None of these arguments are persuasive.

Appellants' first argument relies on distinguishing the Standstill Agreement from a reaffirmation agreement. Reaffirmation agreements are agreements "based at least 'in part' on the

discharged debt" and which therefore must comply with the requirements of 11 U.S.C. § 524(c). *In re Lopez*, 345 F.3d 701, 707 (9th Cir. 2003) (quoting § 524(c)); *see also Bobka v. Toyota Motor Credit Corp.*, 2018 WL 2382766, at *4 (S.D. Cal. May 24, 2018) (noting reaffirmation agreements "are contrary to the stated goal of a debtor receiving a fresh start" and are therefore "subject to intense judicial scrutiny and must comply with all statutory requirements" (citation omitted)). The Bankruptcy Court found that the Standstill Agreement did not comply with § 524(c)'s requirements, a finding Appellants do not dispute here. ER at 12 ("[T]o be a valid agreement it ... must ... satisfy the requirements of 524 (c). There are five requirements. None of them are satisfied and they couldn't be because it has to be entered into pre- prior to discharge.").

To avoid the Bankruptcy Court's finding, Appellants contend that the Standstill Agreement is not a reaffirmation agreement but is instead a valid post-petition agreement. Appellants suggest contracts (such as the Standstill Agreement) constitute valid post-petition agreements provided that there is "some new separate consideration for the subsequent agreement." Appellant Br. at 10. Appellants argue that they provided new consideration by agreeing to wait two months before foreclosing on Appellee's property, and that Appellee provided new consideration by agreeing to waive his claims against Chris Rufer, Morning Star, Tim Cruise and Nick Kastle. *Id.* at 10. Appellants point to *In re Heirholzer*, which found that a post-discharge contract was not a reaffirmation agreement because the creditor's "decision to forego

foreclosure represents new and sufficient consideration to support a binding post-discharge obligation." 170 B.R. 938, 941 (Bankr. N.D. Ohio 1994). Appellants also cite *In re Martin*, which found that "post-petition agreements can create an enforceable obligation." 474 B.P. 789, at *7 (B.A.P. 6th Cir. 2012).

Appellants' argument is not credible. By its terms, § 524(c) applies to "[a]n agreement between a holder of a claim and the debtor, the consideration for which, in whole *or in part*, is based on a debt that is dischargeable ... ." 11 U.S.C. § 524(c) (emphasis added). The Standstill Agreement reaffirms Appellee's debts to Appellants under an already-discharged promissory note, which is precisely why Appellants filed a lawsuit in state court to collect the balance due under the discharged promissory note. *Id.* at 153–58 (copy of state court complaint seeking to collect on discharged promissory note); Appellant Br. at 5 ("On February 15, 2017, Morning Star filed a verified complaint in Yolo County Superior Court seeking payment of the balance due."). Thus even assuming *arguendo* that Appellants' delay and Appellee's waiver were valid consideration, the Standstill Agreement would remain at least "in part" based on Appellee's reaffirmation of hundreds of thousands of dollars of previously discharged debt. Appellant Br. at 4 (noting that as part of the Standstill Agreement Appellee agreed that he still owed $345,334.59 plus interest under a note discharged in bankruptcy).

Heirholzer and *Martin* do not compel a different conclusion. To start, both decisions are out-of-circuit bankruptcy decisions which means they are not binding here. Moreover, *Heirholzer* was

premised on a finding that the post-discharge agreement was "completely separate from the initial note that was discharged in bankruptcy." 170 B.R. at 941. By contrast, the Standstill Agreement reaffirms debts owed under a promissory note that was discharged in bankruptcy. *See also In re Getzoff*, 180 B.R. 572, 575 (B.A.P. 9th Cir. 1995) (rejecting argument that, in light of *Heirholzer*, a post-petition agreement in which creditor traded an extension of a loan for debtor's promise to honor discharged debt was valid).

Furthermore, *Martin*'s statement that "post-petition agreements can create an enforceable obligation" referred to "debt that arises *after* the creditor files for bankruptcy relief ... ." 474 B.R. 789, at *7 (emphasis added). That holding is inapplicable here because Appellee's debt arose before bankruptcy. Furthermore, *Martin* affirmed a bankruptcy court's finding that a creditor was in contempt for violating the discharge injunction where the creditor sought to enforce a post-discharge agreement and relied on the same theory Appellants pursue here. *Id.* at *10 (affirming sanctions despite creditor's mistaken belief that post-petition agreement with debtor was valid because "debtor had voluntarily agreed to enter into a new contract with him"). The bottom line is that the Standstill Agreement is a reaffirmation agreement that did not comply with § 524(c)'s requirements. Thus, Appellants violated the discharge injunction.

Appellants' second argument is that Appellee has judicially admitted that the Standstill Agreement is valid and cannot now argue otherwise. Appellants' argument rests on Appellee's complaint in his malpractice suit against the attorneys who

advised him in connection with the Standstill Agreement. The complaint alleges that Appellee's erstwhile attorneys "should have advised Plaintiff that entering into the ... [Standstill] Agreement would be considered new consideration and that Plaintiff's obligations under the ... [Standstill] Agreement would therefore not be included in the discharge Plaintiff received in his bankruptcy case." Appellant Br. at 17. Appellants' theory is unpersuasive because the complaint's statement is not a judicial admission. "Judicial admissions apply only to factual statements, not statements of law." *Maloney v. Scottsdale Ins. Co.*, 256 F. App'x 29, 32 n.3 (9th Cir. 2007). A conclusion about the legal effect of a contract or a bankruptcy discharge is a statement of law, not a statement of fact.[2] Even assuming *arguendo* that some legal conclusions are binding, this statement is not one of them. The complaint is describing how the Standstill Agreement "would be considered" by others, not what the Standstill Agreement's actual legal effect is or how Appellee himself understands it. Thus, the statement does not bind Appellee to any particular view as to the Standstill Agreement's validity or invalidity.

Appellants' third argument is that Appellee cannot rely on the discharge injunction's protection because he voluntarily signed the Standstill Agreement after the discharge. Appellants rely on a

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[2] More generally, it is a stretch for Appellants to rest their argument that the Standstill Agreement is valid on a lawsuit alleging Appellee's former lawyers committed malpractice by advising him to sign it.

strained reading of *In re Ybarra*, 424 F.3d 1018 (9th Cir. 2005), and *Siegel v. Federal Home Loan Mortgage Corp.*, 143 F.3d 525 (9th Cir. 1998). Appellants claim these cases show that a debtor cannot use a discharge injunction as a shield against contractual liability after "affirmatively seeking and obtaining the new" agreement following discharge from bankruptcy proceedings. Appellant Br. at 12.

Appellants read *Ybarra* and *Siegel* far too broadly because both decisions were concerned with the narrow issue of attorney's fees. *Siegel* "held that an award of attorney fees incurred post-petition based on a pre-petition cause of action was not discharged in bankruptcy." *Ybarra*, 424 F.3d at 1021. *Ybarra* simply "reaffirm[ed] that claims for attorney fees and costs incurred post-petition are not discharged where post-petition, the debtor voluntarily commences litigation or otherwise voluntarily 'return[s] to the fray.'" *Id.* at 1026 (quoting *Siegel*, 143 F.3d at 533–34) (second alteration in original). Neither decision states or implies that a contract reaffirming a discharged debt is somehow exempt from the discharge injunction. Moreover, even if *Ybarra* and *Siegel* could be read as Appellants suggest—and they cannot—Appellants fail to explain how this new exemption to the discharge injunction would excuse the Standstill Agreement's noncompliance with § 524(c)'s requirements for debts "based at least 'in part' on the discharged debt[s]." *Lopez*, 345 F.3d at 707.

In sum, the Court finds that the Standstill Agreement was barred by the discharge injunction. The Court now turns to whether the Bankruptcy Court's orders finding Appellants in contempt for attempting to enforce the Standstill Agreement and

awarding Appellee attorney's fees and costs were permissible.

B. Contempt Finding

A discharge under Chapter 7 of the bankruptcy code "discharges the debtor from all debts that arose before the date of the" bankruptcy petition. 11 U.S.C. § 727(b). Once issued, the discharge "operates as an injunction against the commencement or continuation of an action ... to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). A party who violates the discharge injunction can be held in contempt. *In re Zilog, Inc.*, 450 F.3d 996, 1007 (9th Cir. 2006). The party seeking contempt sanctions "must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Taggart II*, 888 F.3d at 443 (quoting *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002)).

The requirement that the contemnor "(2) intended the actions which violated the injunction" is not at issue. *Taggart II*, 888 F.3d at 443.The Bankruptcy Court found that the action which violated the discharge injunction was filing the state court complaint to collect on the Standstill Agreement:

MS. OELSNER: No, I understand. No, no. I understand what you're saying and I – I have been doing this for 30 years, so I appreciate the argument you're making. But the entering into the second Standstill Agreement—

THE COURT: But that wasn't what violated the discharge. It was only when you sought to collect.

MS. OELSNER: By filing the complaint.

THE COURT: Right.

ER at 13. Appellants do not dispute that they intended to file the state court complaint. Thus, the second requirement is met because "[t]he focus is on whether the offending party's conduct violated the injunction and whether that conduct was intentional; it does not require a specific intent to violate the injunction." *In re Shaw*, 2017 WL 2791663, at *5 (B.A.P. 9th Cir. June 27, 2017); *see, e.g., In re Meints*, 2017 WL 5973319, at *7 (C.D. Cal. Jan. 4, 2017) (finding attorney's filing of a complaint warranted contempt sanctions where attorney knew of discharge injunction and intended to file complaint).

The parties' dispute instead centers on whether Appellants "(1) knew the discharge injunction was applicable" to the debts the Standstill Agreement purported to revive. *Taggart II*, 888 F.3d at 443. "This standard requires evidence showing the alleged contemnor was aware of the discharge injunction *and* aware that it applied to his or her claim." *Taggart I*, 548 B.R. at 288 (emphasis in original). If a creditor disputes that they had this knowledge, "a finding that they knew of the injunction, and thus willfully violated it, can only be made after an evidentiary hearing." *Zilog*, 450 F.3d at 1008. A creditor's "good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the

creditor's belief is unreasonable." *Taggart II*, 888 F.3d at 444.

Appellants argue that the Bankruptcy Court erred because it did not find that Appellants were aware that the discharge injunction applied to their attempt to enforce the Standstill Agreement. The Bankruptcy Court found Appellants willfully violated the discharge injunction because "as I read the pleadings, there is nothing to indicate that the respondents Morning Star and others didn't understand that this was a discharged debt." ER at 12–13 (hearing transcript). This is in one sense correct: Appellants do not meaningfully dispute that they knew the debt subject to the Standstill Agreement was discharged. However, that is only half of the inquiry because the "alleged contemnor ... [must be] aware of the discharge injunction **and** aware that it applied to his or her claim." *Shaw*, 2017 WL 2791663, at *5 (bold emphasis in original); *Taggart I*, 548 B.R. at 288 (stating same). The Bankruptcy Court overlooked the latter requirement because Appellants argued at length that the discharge injunction did not apply to the Standstill Agreement, a position which could indicate that Appellants may not believe that the discharge injunction applies to their claims. *See* ER at 97–112 (opposition to motion for contempt arguing at length that the Standstill Agreement is not subject to the discharge injunction); Appellants' Br. 8–13 (repeating similar arguments here).

To be clear, the Bankruptcy Court could certainly have found that despite Appellants' arguments, Appellants were in fact aware that the discharge injunction applied to Appellants' claims. As Appellee points out, Appellants filed a notice of

special appearance before the Bankruptcy Court, the order discharging Appellee from bankruptcy was served on Appellants, and Appellants amended their complaint in the state court suit to plead around the discharge once Appellants were informed that their initial complaint violated the discharge injunction. ER 155, 168–71, 180–81. Nonetheless, it does not appear from the record that the Bankruptcy Court found that Appellants were aware that the discharge injunction applied to Appellants' claims.

By finding only that Appellants knew of the discharge injunction, but not that Appellants were aware of the discharge injunction's applicability, the Bankruptcy Court did not apply the correct legal standard for finding Appellants in contempt. *Taggart II*, 888 F.3d at 444 ("[T]he bankruptcy court abused its discretion by applying an incorrect rule of law."). The Bankruptcy Court therefore abused its discretion. *See Perry v. Brown*, 667 F.3d 1078, 1084 (9th Cir. 2012) ("[A]n error of law constitutes an abuse of discretion.").

Underscoring the point, both *Taggart* and *Shaw* reversed contempt sanctions on strikingly similar facts. In *Taggart*, a group of creditors knew of the debtor's discharge but nonetheless sought attorneys' fees based on "a good faith belief that the discharge injunction did not apply to their claims ..." *Taggart II*, 888 F.3d at 444. The Bankruptcy Court still imposed contempt sanctions on the creditors because it "concluded that it was irrelevant whether the Creditors held a subjective good faith belief that the discharge injunction did not apply to their claim." *Id.* at 443. The Bankruptcy Appellate Panel ("BAP") subsequently reversed the bankruptcy court, and the Ninth Circuit affirmed the BAP. *Id.* at

444. The Ninth Circuit agreed that the creditors' belief that the discharge injunction did not apply was incorrect but nevertheless found that the creditors' "good faith belief, even if unreasonable, insulated them from a finding of contempt." *Id.*

In a similar vein, *Shaw* reversed a bankruptcy court's imposition of sanctions on a creditor for a violation of the discharge injunction because the BAP found the bankruptcy court had conflated the creditor's undisputed knowledge of the injunction's existence with the creditor's knowledge of its applicability and had failed to make "any finding as to whether she knew the discharge injunction 'applied' to her causes of action in the FAC." *Shaw*, 2017 WL 2791663, at *5.

There is also a second, independent basis for vacating the sanctions award. Even assuming *arguendo* that the Bankruptcy Court's decision could be construed as finding that Appellants knew the discharge injunction was applicable, Appellants are correct to argue that an evidentiary hearing would be required to resolve that contested question of fact. Both the Ninth Circuit and BAP have so held. *Zilog*, 450 F.3d at 1008 (Ninth Circuit decision stating that "[i]f, as here, the creditors dispute that they had such knowledge [of the injunction], a finding that they knew of the injunction, and thus willfully violated it, can only be made after an evidentiary hearing."); *Shaw*, 2017 WL 2791663, at*6 (BAP decision finding that "since [the creditor] disputed that the discharge injunction applied to any of her causes of action in the FAC, the bankruptcy court was required to hold an evidentiary hearing, which it did not do."). This too compels reversal.

In sum, the Bankruptcy Court abused its discretion by failing to make a finding that the creditors were aware the discharge injunction applied to their claims and by failing to conduct an evidentiary hearing.

IV. CONCLUSION

For the foregoing reasons, the Court VACATES the Bankruptcy Court's order finding Appellants in contempt and the Bankruptcy Court's order awarding Appellee $19,247.74 in attorney's fees and costs and REMANDS for reconsideration of the sanctions award. On remand, the Bankruptcy Court may find Appellants in contempt and impose appropriate sanctions such as attorney's fees and costs or punitive damages once the Bankruptcy Court has held an evidentiary hearing and applied the legal standard.

IT IS SO ORDERED.

Dated: July 25, 2018
/s/ Lucy H. Koh
LUCY H. KOH
United States District Judge